

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK**

CROWN CASTLE FIBER LLC,

Plaintiff,

v.

CITY OF ROCHESTER, NEW YORK; MALIK D. EVANS, as the MAYOR of the CITY OF ROCHESTER (in his official capacity); RICHARD PERRIN, as the COMMISSIONER, CITY OF ROCHESTER DEPARTMENT OF ENVIRONMENTAL SERVICES (in his official capacity); and the ROCHESTER CITY COUNCIL,

Defendants.

Civil Action No. 6:20-cv-06866-EAW-MWP

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S MOTION *IN LIMINE* TO
EXCLUDE DEFENDANTS’ COST SPREADSHEET AND TO PRECLUDE LOUIE
TOBIAS FROM OFFERING EXPERT OPINION TESTIMONY**

This case concerns the legality of the Defendant City of Rochester’s (“City”) telecommunications code (“Telecom Code”), which imposes exorbitant fees on communications infrastructure installed in City rights of way in violation of federal and state law. Following the Court’s Decision and Order denying the parties’ respective motions for summary judgment, the City bears the burden of proof at trial to demonstrate that its fees are a reasonable approximation of its costs to manage City rights of way. Decision and Order, *Crown Castle v. City of Rochester*, No. 6:20-CV-06866, at 2-3 (W.D.N.Y. Aug. 22, 2022) (Dkt No. 35). The Court will hold a single trial for three separate cases, filed by Crown Castle, Cellco d/b/a Verizon Wireless (“Verizon”), and ExteNet Systems Inc. (“ExteNet”), all of which bring similar claims against the Telecom Code and the fees it imposes. *See* Minute Entry, Dec. 20, 2022 (Dkt No. 39).

To meet its burden, the City intends to introduce at trial an Excel document that the City contends helps to substantiate its costs (the “Cost Spreadsheet”). The City also intends to call as a witness the City’s Telecommunications Director, Louie Tobias, who created the Cost Spreadsheet. The Cost Spreadsheet is inadmissible, for at least three reasons: (i) it does not qualify for the public records exception to hearsay; (ii) it was prepared in anticipation of litigation; and (iii) several factors make it inherently unreliable and untrustworthy. Likewise, any opinion testimony the City intends to elicit from Mr. Tobias regarding the reasonableness of the City’s costs, cost allocations, or fees, or regarding the appropriate allocation of costs, is also inadmissible because Mr. Tobias has not been designated as, nor is he qualified to testify as, an expert witness.

Plaintiff Crown Castle Fiber LLC (“Crown Castle”) joins and adopts the legal reasoning on these points put forth by Cellco d/b/a Verizon Wireless (“Verizon”) and ExteNet Systems Inc. (“ExteNet”) in their respective motions *in limine*. See *ExteNet Systems, Inc. v. City of Rochester, New York*, No. 6:20-cv-07129 (motion filed Feb. 24, 2023) (Dkt. No. 51); *Cellco Partnership D/B/A Verizon Wireless v. City of Rochester*, No. 6:19-cv-06583 (motion to be filed Feb. 24, 2023).

In light of the foregoing, Crown Castle joins the other plaintiffs in the separate suits in asking the Court to exclude the Cost Spreadsheet from the consolidated trial and to preclude Mr. Tobias from offering expert opinion testimony.

Respectfully submitted,

/s/ Joshua S. Turner

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February 24, 2023

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Joshua S. Turner, hereby certify that on February 24, 2023, I electronically filed the foregoing Memorandum of Law with the clerk of court for the U.S. District Court for the Western District of New York using the Court's CM/ECF system, which will serve the filing on all participants who are registered CM/ECF users.

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